Before the

# Federal Communications Commission

Washington, D. C. 20554



In the Matter of

Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands

PR Docket No. 92-80
RM 7909



To: The Commission

## REPLY COMMENTS OF SPECTRUM ANALYSIS & FREQUENCY ENGINEERING, INC., IN RESPONSE TO NOTICE OF PROPOSED RULE MAKING

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**Spectrum Analysis & Frequency Engineering, Inc., (SAFE)** herewith submits it's reply comments on the Commission's proposals designed to reduce the delays associated with the processing of applications for stations in the Multipoint Distribution Service (MDS) thereby allowing entities licensed in the MDS to realize their competitive potential.

## Background

1. We enthusiastically support and applaud the Commissions' efforts to "...facilitate wireless cable as a competitive multichannel source of video programming."[1] **SAFE** responded to over 20 specific requests for comment in the NPRM and also proposed five specific areas of change which we believe would solve much of the administrative log jam

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1. Notice of Proposed Rule Making (PR Docket No. 92-80, released May 8, 1992) at ¶ 4.

that we believe would solve much of the administrative log jam in this service and further the goals of NPRM. Of the five points the first three are key:

1.) The 31 contiguous channels should be considered together, when and where possible.

2.) A prior coordination process should be used as a way to establish new service locations.

3.) The FCC should require a quick build out.

4.) The application process should be redesigned to enable automatic entry of the data into the FCC database.

5.) Settlement groups and lotteries do not apply to this service and should have no place in the rules.

We will show in greater detail how certain aspects of these proposed changes can be implemented considering comments we read.

## Introduction

Several commenters raised issues and discussed problems not considered, or discussed in only a cursory way in the NPRM. Among the issues we found in many of the comments related to problems of spectrum hoarding and a kind of spectrum blackmail. We show in our reply comments how our suggestions could eliminate these problems. Commenters pointed out how under the current rules licensees are holding on to spectrum in an effort to gain financial benefit not through building out the system but by keeping others from building. It is clearly a chess game with the powerful players attempting to grab up the most pawns before others grab them. The current rules do nothing to discourage this spectrum warehousing. A simple list of these spectrum warehousers should be scrutinized by the commission. There are relatively few. They use their families, partners, and even their employees to submit applications for markets for them

directly against the spirit and intention of the rules. These are the people who cried foul when application activity increased recently. Why? What were they losing? They were losing the capability to warehouse even the smallest rural markets that the new entrants were finding. These small markets often fell less than fifty miles from a previously applied-for station were studied and cleared through standard engineering. But have been returned as a result of the contraversial decision of the bureau to revert to the April 20th. '88 Public Notice distance separation. But the warehousing continues. Because of the apparently large number of markets in this category we will make one more suggestion that we would like the FCC to consider in this rulemaking. That suggestion we will call #6 involves a punitive action such as a fine for any license holder that cannot or refuses to build the system, will not join forces or cooperate with the adjacent channel licensee, and does not return the license to the FCC. License holders in this category will return thier licenses for reallocation.

## Discussion

SAFE is an engineering consulting firm with a unique perspective on the subject of this NPRM. Our clients are applicants, grantees, tentative selectees, operators, and investors. The sentiments of our clients were echoed throughout the comments. For the most part they are against any kind of distance separation standards. They want the continued flexibility to serve markets that are isolated by terrain from other markets if not isolated by distance. Most of all they want certainty. They want to know when they "do their homework" there will be a result at the other end. There is no public benefit to have spectrum open and 20,000 applicants waiting years to find out only that the rules changed and they have to hire an engineer and start all over again. This time the rules should be revised for the long term. No quick fixes. The quick fixes of the past two years

have not furthered the goals of this NPRM. If all the applications have to be returned perhaps it must be done. The '83 applications that have not been processed should not forever be a cloud over all future applications. Notice should be given that all granted station holders must show some signs of construction within one month or they should turn in their license.

**1.) The 31 contiguous channels should be considered together, when and where possible.**

A theme running through the comments is that the most important factor for a wireless cable operator is the number of channels in system. If the entire block of 31 channels were considered and allocated in one block the applicant / grantee may be able to put together a system that can be built. The NPRM and several of the commenters noted that applications have been granted and stations not built .[2] The FCC believes that this is due to speculative filings. We believe it is because the applicant / operator did not have enough channels to make his[3] system competitive and thereby obtain financing. If the FCC would further look into these applicants who did not build out their systems, they will find that they were not prepared by the "application mills". Applicants that went to "application mills" are only there to receive a service that they cannot get elsewhere. The record is that the application mill clients build their stations if they can get a critical mass of channels. The real problem is not who prepared the application, or how many people share the license. The real issue is an economic one: is the proposed system a viable competitive enterprise? If it is, it will be built. If it is not, it will not be built. Most of the granted stations that were not built are one or four channel systems. The licensee was unable or unwilling, to obtain agreements with the other grantees. We understand that this suggestion may

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[2] NPRM at footnote 32 "...more than 350 MDS construction permits or construction permits or conditional licenses have been cancelled or forfeited for failure to construct

[3] In this document the male gender is to be taken to mean male or female i.e. his/her, he/she.

be an administrative problem but there are simple steps that can be taken to make a transition to a 31 channel block allocation. The Wireless Cable operator would operate the ITFS channels on a secondary basis. ITFS channels could be leased by the MMDS licensee from an existing ITFS operator. If there are none, the MMDS user may use them full time as a secondary user. The same safeguards that exist and are continued in the NPRM would be continued under our proposal. The applicant would only utilize the ITFS blocks if sharing, leasing, and channel mapping is in place with any ITFS grantees. Should an ITFS qualified operator want to make use of the ITFS channels once a 31 channel allocation has been made to the MMDS operator, the ITFS operator may simply recover those channels and operate from the MMDS transmit facilities under agreed terms. The MMDS operator can be thought of as a "caretaker" of the ITFS channels. With the transmitters already in place by this allocation suggestion there will be many more ITFS systems taking advantage of these facilities for daytime educational transmissions. Rather than taking something away from the ITFS community the Wireless Cable operator is building and maintaining an ITFS system for the use of an ITFS qualified operator who desires to take advantage of it. It seems that this proposal will benefit both parties. There will be no complaints form the Wireless cable community and we certainly would expect only positive comments from the ITFS users who will be getting transmit facilities all over the country with little or no involvement from them except to deliver their program material to the wireless headend. We should all agree that these 31 contiguous channels are a necessary block that should be considered together in any market. ITFS institutions have the use of say 16 to 20 channels during daytime. If the ITFS operator has built his system and owns and operates a transmitter he may lease his capacity in the evenings to the Wireless Cable operator. If the ITFS transmitters were purchased and built by the Wireless Cable operator then he may use any unused channels at

anytime day or evenings. If an ITFS operator wants to install and operate his own equipment then he has the right to do so, since the Wireless Cable operator is a secondary user of those channels. This 31 channel allocation would be made by an application submitted on one form and certified that it has been successfully coordinated with the existing or planned (prior coordinated) within 112 kilometers. This suggestion together with the following suggestion will be one of the most important developments in the history of the Wireless Industry. It will truly make the Wireless Cable industry competitive and fundable.

**2.) MMDS Prior Coordination Process.**

We agree with the comments of Daniel J. Marshall, and others who proposed frequency coordination as a means of easing the burden of the FCC in processing applications. Let the industry do the work. Get the FCC into the mode of overseer rather than processor of engineering. There is a wealth of engineering talent in this industry and this talent has always been available. In other services the prior coordination process works well. The Common Carrier Bureau is well aware of how such a system can function. For example, before the FCC would actually receive an application for service the MMDS applicant would have concurrence from the previously granted/operating system owners (within 112 km) as to the compatibility of his/her system. This is done through a "prior coordination" process similar to that already in use and very successful in other services. A prior coordination process is one where a notice of intent to file an application for a license is sent by the prospective applicant to all previously filed entities within a certain distance of the intended transmit location. Along with the notice there is usually an engineering resolution to potential interference conflicts. There is a fixed time period for replies, and responses during which each system engineer reviews the proposal and concurs

with the evaluation. The proposing engineer may be asked to submit detail information such as path profiles. The proposal cannot be refused if it can be shown to be technically sound. The beauty of this process is that is based on the laws of physics. There is a yes and no answer to any proposal. The diligent applicant can know the answer to the question before an application is submitted. If the physics of the site placement is acceptable there should be no reason it is not successful. The other users within the coordination distance cannot refuse it if it has. There is no work to be done at the FCC. It is all done by the interested parties. It could be an easy coordination or a difficult coordination. The coordination may fail or may be successful. But it does not tie up the resources of the FCC. The prior coordination limits the arena to those parties who have existing or planned facilities within the coordination distance. The successful coordination guarantees that there will be no petitions to deny once the application is submitted. The FCC would see an application after it was agreed to by all parties as acceptable. At that point it would require only a cursory review. Those who have warehoused a number of markets and are waiting to be bought out will have no need for this kind of change. For those who have a fast track to inside information at the FCC will also have no need for this idea. This suggestion evens the playing field. It makes everyone meet the same criteria, the criteria of sound engineering. The current rules and practice favors only those who, have an inside track, are able to produce letter perfect applications, have the resources to withstand numerous frivolous petitions to deny and can wait ten years while their application is lost in the shuffle. A rule change to establish a prior coordination process would totally remove this entire problem from the FCC. If the rulemakers are truly interested in a solution to the administrative burden then they should seriously consider the establishment of a prior coordination process. What is in place now is clearly not workable. Commenters pointed out that there is often a lack of cooperation among

competing applicants in a market. The prior coordination process will be a system whereby cooperation has a value. Problems would be solved by the interested parties. The FCC engineers would only get involved when there is a question or problem that can not be solved by the applicants or engineers during the coordination process. The prior coordination would start the process of communication and cooperation among nearby service providers that is essential for the success of this industry. If an application mill wanted to coordinate 100 potential operators with an idea to getting a lottery established for that market the other operators would only have to respond to the first prior coordination notice received and send the others back. The first notice may be simply one the operator chooses if they are all delivered on the same day. All prior coordination requests can be required to have self addressed stamped envelopes enclosed for this purpose. This will simply remove the idea of multiple filing from the application mills. There may be many other ways the application mills (which include several very reputable law firms) can serve the industry by providing service to applicants. Let the rules be geared toward enabling the operator to have his system licensed faster with greater competitive potential. The idea of a prior coordination and strict construction time limits are administrative measures that would further the goals of this NPRM.

**3.) Strict Construction Time Limits.**

Many of the commenters mentioned the hoarding of spectrum and the many methods available to prolong the process of spectrum warehousing. Our suggestion of strict time limits would in one simple ruling totally eliminate this problem. There should be a strict time limit in which the grantee should have in which to construct. The 12 month construction time limit is not in the public interest and actually lends itself to speculation. Most of the commenters would agree that the

license grant should be made swiftly, perhaps within a short time (a few weeks?) of the completion of the coordination process. The applicant should be required to show within one month of the grant, one or more of the following:

a) Certificate of completion of the pouring of the slab for the foundation of any building or tower required and firm order of equipment from a bonafide equipment supplier, with appropriate down payment or financing arrangement.

b) Lease of the headend and tower space with a copy of the check used for the deposits, and firm order of equipment from a bonafide equipment supplier, with copy of the check used for the down payment or appropriate financing arrangement.

c) Firm commitments from programming sources and the order for appropriate equipment for delivery of that programming (earth station, video tape machines or microwave relay, etc.).

A strict construction timetable requirement will do more to deter speculators or make speculators into real builders than financial certifications or any of the other ideas presented. Grant the full block quickly and if they don't build quickly take it away. The idea is to get service to these communities.

**Conclusion:**

When these three suggestions are implemented there would be no real need for a faster method of data entry (Suggestion #4) nor would there be settlement groups (suggestion #5). The focus should be on the economic entity. Planning is essential for any enterprise. Planning cannot exist in an uncertain environment. There is no way to plan under the current system. The current state of MMDS application processing is recognized by the FCC as woefully inadequate. It is to their credit that this NPRM has been established. With the establishment of the first three of these suggestions certainty and planning can begin. Planning and certainty will be required of the applicant. With the grant of a construction permit (which will be assured, having completed the

prior coordination process) he will be required to build within a specific time-frame. The applicant will have arranged his financing, tower lease, building lease or new construction permits, and equipment purchase. The applicant will have to show progress within a short timeframe. This is reality. This will eliminate speculation. If you are not going to build, don't apply. If you have existing licenses either build or give them up. Let someone apply who will build. Give the Wireless industry 31 channels. That makes them competitive. Keep the ability of ITFS operators to use 16 to 20 of those. That gives an immediate boost to the educational community. Prior coordination takes all the work out of the FCC offices. We don't care which branch processes the application since it is only a cursory review of agreements and letters of cooperation from those directly involved. The FCC is not eating up time in this process if the Wireless community is allowed to solve their own engineering problems through prior coordination.

**Dated: July 14, 1992**

Respectfully submitted,

**SAFE**
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